

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

BRAD A. HAYS

APPELLANT,

**v.
STATE OF MISSOURI**

RESPONDENT.

DOCKET NUMBER WD73468

DATE: February 7, 2012

Appeal From:

Lafayette County Circuit Court
The Honorable Dennis A. Rolf, Judge

Appellate Judges:

Division Two: Gary D. Witt, Presiding Judge, Joseph M. Ellis, Judge and Mark D. Pfeiffer,
Judge

Attorneys:

Mark A. Grothoff, Columbia, MO, for appellant.

Shaun J. Mackelprang and Richard A. Starnes, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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No. WD73468

Lafayette County

Before Division Two: Gary D. Witt, Presiding Judge, Joseph M. Ellis, Judge and Mark D. Pfeiffer, Judge

Brad Hays was convicted by a jury and sentenced for the commission of multiple crimes against Alvin Ford. The crimes for which Hays was convicted consisted of second-degree burglary, felony stealing, first-degree robbery, first-degree burglary, first-degree assault, and armed criminal action. Hays argued in a post-conviction motion that his trial counsel was ineffective for failing to call a witness and failing to object to certain trial testimony. The motion court denied Hays's claims and Hays now appeals.

AFFIRMED.

DIVISION TWO HOLDS:

In Point One, Hays argues the motion court erred because his counsel was ineffective for failing to call and interview Kenneth Kleihauer, the brother of Hays's alleged co-conspirator, Steve Kleihauer. The motion court mistakenly believed that Hays was arguing his trial counsel was ineffective for his failure to call Steve Kleihauer as a witness. This does not require reversal, as we will not reverse where the motion court reached the correct result even if for an improper reason. First, the testimony that Hays alleges Kenneth Kleihauer would have given, had he been called as a witness, would not have provided Hays with a viable defense and would not have negated any elements of a crime for which Hays was convicted. Second, no evidence was presented that Kenneth Kleihauer was available to testify at Hays's trial, that he would have testified as Hays claims, or that Hays's counsel was even aware that Kenneth Kleihauer could have testified. Point One is denied.

In Point Two, Hays argues the motion court erred because his counsel was ineffective for failing to object to testimony by Lisa Seevers that she was "fearful" of Hays as irrelevant and improper propensity evidence. Hays's trial counsel testified at the evidentiary hearing that his failure to object to this testimony was strategic. It is not clear that an objection by counsel to Seevers's testimony would have been meritorious, as the testimony did not constitute a prior "bad act" but was only general as to the witness's fear of testifying. Further, the testimony was relevant in that it pertained to the witness's demeanor on the stand and her credibility in general. As the testimony was so vague, the likely prejudice to Hays was minimal. Regardless of whether the objection would have been sustained, trial counsel made clear that his decision not to object

was strategic and this is clearly within the permissible range of professional judgment. Point Two is denied.

Opinion by Gary D. Witt, Judge

February 7, 2012

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